



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE NO. 2070 OF 1997**

**ESTHER NJAMBI DEWEY.....PLAINTIFF**

**versus**

**ZIPPORAH WANGARI KIMANI.....1ST DEFENDANT**

**KENYA COMMERCIAL BANK LTD.....2ND DEFENDANT**

**R U L I N G**

The plaintiff instituted a suit against the two defendants particulars of which are set out in the plaint. Some interim orders were obtained that affected the interests of one Paul Muira who then moved the court to be joined as an interested party.

By an application filed on 16th April, 1998, the plaintiff sought orders to restrain the interested party, the said Paul Muira, from selling, transferring, charging or committing acts of trespass and/or waste on the suit premises known as L.R. Number 4894/285. The same application also sought to restrain the interested party from proceeding further with the construction of any buildings or occupying such buildings pending the determination of this suit or occupying such buildings pending the determination of this suit or further orders of the court. It also sought the removal of the workers therefrom pending the hearing of the suit.

The application is supported by an affidavit sworn by one Alice Mbote, a Decree of a Power of Attorney in respect of the plaintiff's affairs and in particular the suit premises.

The application is opposed and replying affidavits together with grounds of opposition have been filed. All learned counsel have also addressed the court on the salient points herein.

At this stage, the plaintiff is required, to show a prima facie case with a probability of success, that an award of damages shall not be adequate compensation and if the court is in doubt it shall decide the matter on the balance of convenience.

I have gone through the pleadings. The suit against the first defendant by the plaintiff alleges fraud and forgery. No prayers are sought against the interested party. The 1st defendant sold the subject property to the interested party at a consideration. The plaintiff is aware of this and counsel has said as much. It is submitted however that, since conveyance has not passed to the interested party, he does not have a better title and no better title has passed to him. Therefore there is a good case with a probability of success.

It is conceded on behalf of the plaintiff that so far there are no pleadings of fraud against the interested

party but that the pleadings can be amended at any time before the determination and trial of the suit.

But even at this stage the plaintiff has to show the interested party had knowledge of some defect in the title. The title showed the property was owned by the first defendant. It had been charged twice to Kenya Commercial Bank Limited. As the 1st defendant held the title under the registration of Titles Act Cap, 281 the same was indefeasible by virtue of section 23 thereof. If the plaintiff had any claim it cannot be a claim for the land but damages under section 24 of the same Act.

In view of the foregoing, even in the most remote position, I see no prima facie case that has been shown by the plaintiff against the interested party. The matter also concerns immovable property, consideration of the issue of damages is not called for.

I am not in doubt about my findings hereinabove, however, even if I were, the balance of convenience would still tilt in favour of the Interested party. He has paid valuable consideration for the property. He had no notice of any defect of the title held by the 1st defendant, he has taken possession and is about to complete construction. On the other hand the pleadings of the plaintiff stop squarely at the doorstep of the 1st defendant. clearly therefore the balance of convenience favours the interested party.

In view of the foregoing, the plaintiff's application must and hereby fails. The same is dismissed with costs.

Dated and delivered at Nairobi this 5th day of June, 1998

**A. MBOGHOLI MSAGHA**

**JUDGE**